



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 5, 2004

Mr. Reagan E. Greer
Executive Director
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761-6630

OR2004-1699

Dear Mr. Greer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 197266.

The Texas Lottery Commission (the "commission") received two requests from the same requestor for (1) information relating to an investigation and (2) a list of other information relating to the requestor and other current or former employees of the commission. You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.117, and 552.1175 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted. We assume that the commission has released any other information that is responsive to these requests, to the extent that any other responsive information existed when the commission received these requests. If not, then the commission must release any such information immediately. *See* Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000). We note that the Public Information Act (the "Act"), chapter 552 of the Government Code, does not require the commission to answer factual questions, conduct legal research, or create new information in responding to these requests. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). Likewise, the commission need not take affirmative steps to obtain information that is not in its possession, so long as no other individual or entity holds such information on behalf of the commission. *See* Gov't Code § 552.002(a); Open Records Decision Nos. 534 at 2-3 (1989), 518 at 2-3 (1989). However, the commission must make a good-faith effort to relate these requests to any responsive information that is within the commission's possession or control. *See* Open Records Decision No. 561 at 8-9 (1990).

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses the common-law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court applied the common-law right to privacy addressed in *Industrial Foundation* to an investigation of alleged sexual harassment. The investigation files at issue in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. See 840 S.W.2d at 525. The court upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the disclosure of such documents sufficiently served the public's interest in the matter. *Id.* The court further held, however, that "the public does not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. See also Open Records Decision Nos. 393 (1983), 339 (1982). If no adequate summary of the investigation exists, then all of the information relating to the investigation ordinarily must be released, with the exception of information that would tend to identify the victims and witnesses. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. Common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance. See Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

You generally contend that the information submitted as Exhibits B and C relates to allegations and investigations of sexual harassment. Having considered your arguments and reviewed the submitted documents, we find that the information in Exhibit B that is encompassed by HR Case Nos. 04092003-10.2 and 04092003-10.3 relates to investigations of alleged sexual harassment. Accordingly, *Morales v. Ellen* is applicable to the information that is encompassed by those two case numbers. In this instance, the investigative documents do not include adequate summaries of the investigations. Therefore, the commission must release all of the information that is encompassed by Case Nos. 04092003-10.2 and 04092003-10.3, with the exception of the information that identifies the witnesses in the investigations. The commission must withhold that information, which we have marked,

under section 552.101 of the Government Code in conjunction with common-law privacy and *Ellen*.¹

You also contend that other information in Exhibits B and C is highly intimate and embarrassing and of no legitimate public interest. We note, however, that this information concerns the workplace conduct of employees of the commission. As this office has frequently stated, the public has a legitimate interest in information that relates to public employees and their behavior in the workplace. Consequently, such information is not private under section 552.101. Therefore, having considered your arguments, we conclude that the commission may not withhold any of the remaining information in Exhibits B or C under section 552.101 of the Government Code in conjunction with common-law privacy. *See also* Open Records Decision Nos. 405 at 2 (1983) (manner in which public employee performed his or her job cannot be said to be of minimal public interest), 444 at 4 (1986) (public employee's personnel file information will generally be available to public regardless of whether it is highly intimate or embarrassing), 470 at 4 (1987) (public employee's job performance does not generally constitute private affairs), 473 at 3 (1987) (fact that public employee receives less than perfect or even very bad evaluation not protected by common-law privacy), 542 at 5 (1990) (information regarding public employee's qualifications is of legitimate concern to public).

Next, we address your claim under section 552.117 of the Government Code. Section 552.117(a)(2) excepts from public disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether a peace officer has family members, regardless of whether the peace officer complies with sections 552.024 or 552.1175. We have marked information in Exhibits B and C that the commission must withhold under section 552.117(a)(2) if the information relates to a peace officer as defined by article 2.12 of the Code of Criminal Procedure.

To the extent that the information that we have marked under section 552.117 does not relate to a peace officer, the commission may nevertheless be required to withhold the marked information under section 552.117(a)(1). Section 552.117(a)(1) excepts from public disclosure the home address and telephone number, social security number, and family

¹We note that HR Case Nos. 04092003-10.2 and 04092003-10.3 also encompass other private information that the commission would ordinarily be required to withhold under section 552.101. In this instance, however, the rest of the private information implicates the requestor's privacy interests, and she has a special right of access to her own private information under section 552.023. *See* Gov't Code § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Should the commission receive another request for this information from a person who would not have a special right of access to it, the commission should resubmit this same information and request another decision.

member information of a current or former employee of a governmental body who timely requests confidentiality for this information under section 552.024. The determination of whether section 552.117(a)(1) protects a particular item of information must be made at the time of the governmental body's receipt of the request for that information. *See* Open Records Decision No. 530 at 5 (1989). Thus, the commission may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the commission's receipt of these requests for information. The commission may not withhold information under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely election under section 552.024 to keep the individual's section 552.117 information confidential. Therefore, to the extent that the information marked under section 552.117 in Exhibits B and C relates to a current or former commission employee who is not a peace officer, but who timely requested confidentiality under section 552.024, the commission must withhold any such information under section 552.117(a)(1).² Likewise, the social security number in Exhibit D is excepted from disclosure under section 552.117(a)(1) if the former employee to whom it relates requested confidentiality for her social security number under section 552.024.

The commission may also be required to withhold the social security number in Exhibit D under section 552.101. Section 552.101 also encompasses information that is made confidential by statute. A social security number is confidential under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if a governmental body obtained or maintains the social security number under any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security number in Exhibit D is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that requires or authorizes the commission to obtain or maintain a social security number. Thus, we have no basis for concluding that the social security number in Exhibit D was obtained or is maintained under such a law and is therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing the social security number in Exhibit D, the commission should ensure that it was not obtained and is not maintained under any provision of law enacted on or after October 1, 1990.

²We note that Exhibits B and C also contain information relating to the requestor that the commission might be required to withhold from the public under sections 552.024 and 552.117(a)(1). In this instance, however, the requestor also has a right of access to her own section 552.117 information. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987). Should the commission receive another request from a person who would not have a right of access to the requestor's section 552.117 information, the commission should resubmit that information and request another decision.

In summary: (1) the commission must withhold the marked information in Exhibit B that relates to HR Case Nos. 04092003-10.2 and 04092003-10.3 under section 552.101 of the Government Code in conjunction with common-law privacy; (2) the commission must withhold the marked section 552.117 information in Exhibits B and C under section 552.117(a)(2) if that information relates to a peace officer; (3) the commission may be required to withhold the marked section 552.117 information in Exhibits B and C and the social security number in Exhibit D under section 552.117(a)(1) if the information relates to a current or former commission employee who timely requested confidentiality for the information under section 552.024; and (4) the commission may be required to withhold the social security number in Exhibit D under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. The commission must release the rest of the submitted information. As we are able to make these determinations, we need not address section 552.1175.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J.W. Morris III', with a long horizontal flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 197266

Enc: Submitted documents

c: Ms. Sharon Krabe
8211 Landsman Drive
Austin, Texas 78736
(w/o enclosures)